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Issue Date: 28 August 2003

CASE NO.: 2002-LHC-2125

OWCP NO.: 7-152983

IN THE MATTER OF

DAVID A. VILLA
Claimant

v.

INGALLS SHIPBUILDING, INC.
Employer

APPEARANCES:

Michael G. Huey, Esq.
For Claimant

Paul M. Franke, Esq.
For Employer

BEFORE: C. RICHARD AVERY
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et. seq.*, (The Act), brought by David A. Villa (Claimant) against Ingalls Shipbuilding, Inc., (Employer). The formal hearing was conducted in Mobile, Alabama on April 29, 2003. Each party was represented by counsel, and each presented documentary evidence, examined and cross examined the witnesses, and made oral and written arguments.[1] The following exhibits were received into evidence: Joint Exhibit 1, Claimant's Exhibits 1-6 and Employer's Exhibits 1-14. This decision is based on the entire record.[2]

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[1]The parties were granted time post hearing to file briefs. This time was extended up to and through June 30, 2003.

[2] The following abbreviations will be used throughout this decision when citing evidence of record: Trial Transcript Pages- "Tr. __"; Joint Exhibit- "JX __, pg.__"; Employer's Exhibit- "EX __, pg.__"; and Claimant's Exhibit- "CX __, pg.__".

Stipulations

Prior to the hearing, the parties entered into joint stipulations of facts and issues which were submitted as follows:

1. The injury/accident occurred on November 18, 1998;
2. The injury/accident was in the course and scope of employment;
3. An employer/employee relationship existed at the time of the injury/accident;
4. Employer was timely advised of the injury/accident;
5. An informal conference was held on July 18, 2001;
6. Employer paid Claimant benefits including temporary total disability from May 11, 1999 through July 6, 1999, and permanent partial disability for 6% permanent impairment to the left hand ($5,528.21). Total compensation paid to date is $8, 711.37; and
7. Medical benefits have been paid, totaling $24,700.26;

Issues[3]

The unresolved issues in this proceeding are:

1. Average Weekly Wage;
2. Medical Necessity of additional testing and surgery;
3. Section 7 Medicals, specifically the authorization of Dr. Fleet;
4. Maximum Medical Improvement;
5. Nature and Extent of Disability, if any; and
5. Attorney's fees, interest, and other assessments.

Statement of the Evidence

Testimonial and Non-Medical Evidence

Claimant, age 42 at the time of the formal hearing, worked for Employer beginning in 1986 as a joiner, essentially performing carpentry work.[4] Claimant's injury at issue in this case occurred on November 18, 1998, when he was drilling a foundation and the drill locked twisting both of Claimant's arms. Claimant reported his injury to his supervisor, Greg Dupre.

Following his November 18, 1998, injury, Claimant was treated by Dr. WIlliam Crotwell. On April 12, 1999, Claimant was diagnosed with Carpal Tunnel Syndrome (CTS), and shortly thereafter was scheduled for a left Carpal Tunnel release surgery, which was performed by Dr. Crotwell on May 11, 1999. Claimant returned to work on July 7, 1999, with a 6% permanent impairment to his left hand (EX 6, p. 5-7). Claimant continued to work until October 1999 when Claimant complained that the vibrating tools he was required to use were hurting his hands. Dr. Crotwell restricted him from further working with vibrating tools, and consequently there was no

[3] Employer withdrew the 8(f) issue at trial, and has not addressed the issue in post-hearing briefs.

[4] Previously, Claimant worked briefly for Employer from 1983-1984 and was subsequently laid off. He then was self-employed until he hired on again with Employer in 1986.

further work available for Claimant (CX 2, p 60). Claimant has not worked since October 24, 1999.

Claimant testified at the formal hearing about his job search, and how he was ultimately unable to secure employment (TR 34-38). Claimant said that he could not find work within his restriction. He knew that he had been restricted to lifting no more than fifteen pounds. He explained that he hoped to have an internal placement with the shipyard, and called monthly looking for work (TR 32). Outside of the shipyard, Claimant looked in fabrication shops in Mobile, Alabama, calling to see if work was available. Claimant applied for employment at Sears, but was told that his lack of computer experience made him unqualified fo the job. Throughout that time Claimant collected unemployment benefits (TR 35).

In regards to other jobs, Claimant explained to all potential employers that he had been injured, and consequently they did not want to be liable for Claimant (TR 35). Claimant also called Cook's Pest Control, however, his allergy to insulation, and a licensing requirement prevented his obtaining that job. At Blockbuster Video the lifting requirement exceeded his restrictions, and so he did not apply for the position. Claimant explained that he did not complete applications at many of the work locations because he did not have the financial ability to drive to the various sites, and it was easier for him to call. Claimant also explained that his hands hurt after driving 20 miles, and therefore, he did not apply to any jobs beyond a twenty mile radius (TR 55). Claimant also explained that eventually he stopped applying for jobs, because he felt it was futile (TR 44), and that he never actually tried working since his last day with Employer (TR 56). Also in his July 23, 2001, visit to Dr. William Shepard Fleet, Claimant was "pulled from work," (TR 39) and Claimant understood from his meeting with Dr. Fleet that he was restricted entirely from working.

Tommy Sanders, a vocational rehabilitation counselor, prepared a labor market survey dated April 7, 2003 (CX 14). Mr. Sanders' report included a retroactive labor market survey to September 24, 1999 during which time Mr. Sanders reported that Vinson Security had hired 2 guards, NYCO Security had hired 4 guards, and Exxon had hired 4 cashiers. Mr. Sanders explained that these were all jobs which Claimant was capable of performing. As for jobs which were available as of April 7, 2003, Mr. Sanders identified a job with Vinson Guard services either full-time or part-time paying between $5.25-$5.75 /hr., a cashier with Exxon working between 24-38 hours per week at a rate of $5.50/hr., and a parking lot attendant for Republic Parking working between 32-38 hours per week at a rate of $5.25/ hr.

Claimant's Exhibit 6, an affidavit of Claimant's efforts to pursue the jobs identified as suitable alternative employment, was submitted post-hearing. Claimant explained that he contacted the Exxon Service Station manager on April 30, 2003, and filled out an application, but has not been hired. On May 5, 2003, Claimant contacted Republic Parking and filed an application. Finally, on May 6, 2003, Claimant contacted Vinson Guard Service and was informed that they were not taking applications.

Medical Evidence

Claimant was initially treated for the injury in this case by Dr. William A. Crotwell, an orthopedic surgeon. Dr. Crotwell had treated Claimant since 1994, and was the surgeon on

virtually all of Claimant's hand surgeries.[5] Claimant chose Dr. Crotwell as his treating physician (EX 13). In April 1999, Claimant was diagnosed with very mild left carpal tunnel syndrome (CX 2, p. 53). Claimant continued to seek treatment from Dr. Crotwell, who performed a carpal tunnel release on May 11, 1999. Claimant returned to Dr. Crotwell for follow-up appointments through July 1, 1999, at which time Claimant was returned to restricted light duty work, limited to lifting 10-15 lbs.

On September 24, 1999, when Claimant returned to Dr. Crotwell he was found to be a maximum medical improvement, with restrictions of lifting nothing over 30 lbs. infrequently, and only 20 lbs. frequently. Dr. Crotwell stated that Claimant should avoid repetitive movement and should have frequent breaks, approximately every 30 minutes.

On October 22, 1999, Claimant inquired as to his ability to work with vibrating tools, which Dr. Crotwell advised against (CX 2, p. 60), citing increased possibility of aggravating the hand condition. Dr. Crotwell also assigned the left hand an additional 6% permanent impairment based on the carpal tunnel surgery performed in May 1999.

On January 13, 2000, after remarking that Claimant complained of pain in his right hand, Dr. Crotwell noted that Claimant needed to be evaluated by a neurologist, however, the need was not based on any problems with his surgeries or his hand problems (CX2, p. 61). Claimant returned to Dr. Crotwell on July 9, 2001, at which time Dr. Crotwell suggested that Dr. Fleet should follow him and treat him for his problems (CX 2, p. 62). He further suggested that Claimant's problem be treated with medication and returned him to light duty work.

Dr. William Shepard Fleet, a neurologist, initially saw Claimant on November 29, 1999, for a median motor study, which prompted the diagnosis of median bilateral carpal tunnel syndrome (CX 2, p. 76). Dr. Fleet began treating Claimant on July 23, 2001, two weeks following Dr. Crotwell's suggestion that Claimant see the neurologist. Claimant initially complained of headaches. Dr. Fleet prescribed medication, relating Claimant's condition of headaches, neck pain and shoulder pain to the stress of his situation, reiterating that the diagnostic tests showed mild bilateral CTS. Dr. Fleet prescribed Carbatrol for the pain, Ambien to help with sleep disruption, and Nexium to prevent stomach related conditions associated with Vioxx. In a letter dated July 26, 2001, Dr. Fleet stated that Claimant was being treated for right CTS and it was medically necessary for him to be off of work until further notice (CX 2, p. 84). On August 20, 2001,and the monthly visits that followed, Claimant returned for an adjustment of his mediation, and the notes suggest no change in his condition.

Claimant saw Dr. Fleet again on January 9, 2002. Dr. Feet explained that Claimant's condition was unchanged and symptoms persisted, however, Claimant was financially unable to

[5] In 1993 Claimant injured his left hand with a saw, cutting into the part of his hand between the thumb and forefinger. In the years that followed, Claimant experienced a variety of hand problems, including "trigger finger" and other injuries, some of which related to the initial saw cut from 1993 (TR 24-26). Claimant had a trigger finger release on his left hand in 1994 (EX 12, p. 22). Claimant had surgery on his "gamekeeper's thumb" on his left hand in 1995 (EX 12, p. 23-26). Claimant had a trigger finger release on his right hand in May 1997, and then had a Carpal Tunnel release surgery to his right hand in May 1998 (CX 2, p. 50).

stay home any longer and requested a return to work without restrictions. Dr. Fleet saw Claimant again in February of 2002, at which time Claimant stated that he felt ready to have surgery, specifically having the right carpal tunnel release performed first (CX 2, p. 92). Claimant had explained to Dr. Fleet that although the medication helped he was unable to work effectively enough with his hands to find work. Claimant further directed that he wished to have Dr. Barbour as his surgeon, so Dr. Fleet said he would make the referral.

In the months that followed, Claimant returned to Dr. Fleet but his condition remained relatively static. Diagnostic tests performed June 26, 2002, tested Claimant's left arm which showed normal routine study, borderline left carpal tunnel syndrome on the palmar study (CX 2, p. 98). Claimant's right upper extremity was not tested. On July 24, 2002, Dr. Fleet recommended physical therapy for Claimant's left hand. Dr. Fleet surmised that Claimant's condition was no worse that it had been following his initial Carpal Tunnel release surgeries (CX 2, p. 24, ll 22-23).

During his deposition, Dr. Fleet explained that surgery was not "contraindicated" in Claimant's case. Based on the persistence of symptoms, the degree to which these symptoms bothered Claimant, and Claimant's request for a further Carpal Tunnel release, Dr. Fleet would suggest that Claimant undergo the surgery. He explained that the surgery would provide Claimant with a 50% chance of improving his condition (CX 2, p. 21, ll. 8-9).

Dr. Alexander Blevens performed a second opinion examination on September 10, 2002. Dr. Blevens is an orthopaedic hand specialist. He reviewed Dr. Crotwell's and Dr. Fleet's records as well as the plethora of diagnostic studies, specifically noting that an electrodiagnostic test done July 23, 2001, was read as consistent with bilateral CTS, however, Claimant had "fairly short latencies on the right." (CX 2, p. 117). Dr. Blevens concluded that the complained of bilateral pain was inconsistent with the electrodiagnostic findings, which suggested mild carpal tunnel syndrome. Consequently, Dr. Blevens was hesitant to recommend surgery in light of the inconsistencies, further explaining that it is fairly common to have abnormal nerve conduction velocities after CTS because of the failure of complete remyelinization of the affected nerves (CX 2, p. 119). He recommended an electrodiagnostic study with Dr. Mark Ferrante, and absent any abnormalities from that test, he agreed with the permanent impairment rating assigned by Dr. Crotwell.

Dr. Mark Ferrante's studies were performed September 24, 2002, and Dr. Ferrante, a board certified neurologist, concluded that Claimant had bilateral median neuropathies that were mild in degree on the right and minimal in degree on the left. He stated that Claimant reported decreased pain which suggested improvement and a successful surgery, while simultaneously reporting no change in the hand paresthesias, which would suggest no improvement (CX 2, p. 120-122).

Findings of Fact and Conclusions of Law

The following findings of fact and conclusions of law are based upon my observation of the appearance and demeanor of the witnesses who testified at the hearing and upon an analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. In evaluating the evidence and reaching a decision in this case, I have been guided by the

principles enunciated in *Director, OWCP v. Maher Terminals, Inc.*, 114 S. Ct. 2251 (1994) that the burden of persuasion is with the proponent of the rule. Additionally, as trier of fact, I may accept or reject all or any part of the evidence, including that of medical witnesses, and rely on my own judgment to resolve factual disputes or conflicts in the evidence. *Todd Shipyards v. Donovan,* 300 F.2d 741 (5th Cir. 1962). The Supreme Court has held that the "true doubt" rule, which resolves conflicts in favor of the claimant when the evidence is balanced, violates § 556(d) of the Administrative Procedures Act. *Director, OWCP v. Greenwich Collieries,* 114 S.Ct. 2251, 28 BRBS 43 (1994).

Causation

Section 20 (a) of the Act provides claimant with a presumption that his disabling condition is causally related to his employment if he shows that he suffered a harm and that employment conditions existed which could have caused, aggravated or accelerated the condition. *Merrill v. Todd Pacific Shipyards Corp.,* 25 BRBS 140 (1991); *Stevens v. Tacoma Boat Bldg. Co.*, 23 BRBS 191 (1990). The Section 20 (a) presumption operates to link the harm with the injured employee's employment. *Darnell v. Bell Helicopter Int'l, Inc.*, 16 BRBS 98 (1984).

Once the claimant has invoked the presumption the burden shifts to the employer to rebut the presumption with substantial countervailing evidence. *James v. Pate Stevedoring Co.,* 22 BRBS 271 (1989). If the Section 20 (a) presumption is rebutted, the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. *Del Vecchio v. Bowers*, 296 U.S. 280 (1935).

In this instance, Claimant and Employer stipulated in Joint Exhibit 1 that an injury/accident occurred on November 18, 1998, during the course and scope of Claimant's employment. I find that a harm and the existence of working conditions which could have caused that harm have been shown to exist, and I accept the parties stipulation. Claimant clearly injured his left wrist while drilling.[6] The extent, duration and disabling effects of the left hand injury, however, are in issue.

Nature and Extent

Having established an injury, the burden now rests with Claimant to prove the nature and extent of his disability. *Trask v. Lockheed Shipbuilding Construction Co.,* 17 BRBS 56, 59 (1985). A claimant's disability is permanent in nature if he has any residual disability after

[6] There is insufficient evidence that Claimant injured his *right* wrist during this event, as all of Dr. Crotwell's notes and treatment following the November 1998 injury deal with Claimant's left wrist, and even Dr. Fleet's most recent diagnostic tests in June 2002, tested only Claimant's left hand. Dr. Blevens made a point to note that although there was a diagnosis of bilateral CTS, there was very minimal discrepancies in the right hand. Furthermore, all of the forms, including Claimant's LS 202 and Employer's LS-207 all deal only with Claimant's left hand (EX1, p. 1 and EX 3). Therefore, in spite of a diagnosis of *bilateral* CTS, there is insufficient medical evidence to invoke the presumption that Claimant's right hand was injured during the November 18, 1998 event.

reaching maximum medical improvement (MMI). *Id.* at 60. Any disability before reaching MMI would thus be temporary in nature.

The date of maximum medical improvement is defined as the date on which the employee has received the maximum benefit of medical treatment such that his condition will not improve. The date on which a claimant's condition has become permanent is primarily a medical determination. *Mason v. Bender Welding & Mach. Co.*, 16 BRBS 307, 309 (1984). The date of maximum medical improvement is a question of fact based upon the medical evidence of record regardless of economic or vocational consideration. *Louisiana Insurance Guaranty Assoc. v. Abbott*, 40 F.3d 122, 27 BRBS 192 (CRT) (5th Cir. 1994); *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184, 186 (1988); *Williams v. General Dynamics Corp.*, 10 BRBS 915 (1979). The Board has held that when further surgery is anticipated, permanency has not been demonstrated. *Kuhn v. Associated Press*, 16 BRBS 46, 48 (1983).

One of the major issues in this case is whether or not Claimant should be allowed to pursue further surgery on his wrist. If anticipated surgery is not expected to improve a claimant's condition or if a claimant reasonably refuses to undergo surgery, the condition may be considered permanent. *Phillips v. Marine Concrete Structures*, 21 BRBS 233 (1988); *Worthington v. Newport News Shipbuilding and Dry Dock Company*, 18 BRBS 200 (1986). I find that no further surgery has been proven to be medically warranted, and therefore, Claimant has reached maximum medical improvement.

Dr. Fleet is the only doctor who endorses surgery for Claimant's wrist, neither Dr. Blevens nor Dr. Crotwell felt further surgery was suggested. However, even Dr. Fleet's recommendation is not a ringing endorsement. In fact, it is not entirely accurate to say that Dr. Fleet "recommends" surgery, because he stated that if the Claimant desires the surgery, has subjective complaints of pain, and a diagnostic finding of mild CTS, then surgery is not *contraindicated* (CX 2, p.21, ll 8-9). Furthermore, Dr. Fleet stated that the surgery was Claimant's idea, and if Claimant had not asked for it, it appears Dr. Fleet would not have suggested additional surgery (CX 3, p. 26). The necessity of any surgery for which there is only a 50% chance of improvement is also questionable (CX 2, p. 21). Dr. Fleet agreed that without further surgery Claimant had reached maximum medical improvement (CX 2, p. 29-30), and that his condition has remained unchanged since he was released from Dr. Crotwell's care on September 24, 1999 (CX 3, p. 27, ll. 23).[7]

Apparently the only reason Dr. Fleet disagrees with Drs. Crotwell and Blevens is Claimant's subjective complaints of pain. The diagnostic findings and the history which each doctor examined in order to determine the necessity or wisdom of surgery was the same. Consequently, I find that Claimant's subjective complaints of pain are not in and of themselves a reason to authorize surgery which two doctors have determined is unnecessary. Furthermore, Dr. Fleet is a neurosurgeon, and Dr. Blevens and Dr. Crotwell are orthopedic surgeons, each with a specialty in hand surgery. I find, therefore, Drs. Belvens and Crotwell are more qualified to

[7] However, at a different point in his deposition he stated that Claimant would have reached MMI six months following his final, May 11, 1999, Carpal Tunnel release for the left hand, which would be approximately November 11, 1999 (CX 2, p. 29, ll 6-8).

make a finding as to the necessity of further hand surgery. For the above reasons, I find that the opinions of Dr. Blevens and Dr. Crotwell are accorded more weight, and consequently, I accept Dr. Crotwell's finding that Claimant reached MMI on September 24, 1999. I also find that further surgery is not medically necessary, especially in light of Dr. Fleet's opinion that Claimant's condition had not changed since that date. Any compensation awarded after September 24, 1999, date will be permanent in nature.

The question of extent of disability is an economic as well as medical concept. *Quick v. Martin*, 397 F.2d 644 (D.C. Cir. 1968); *Eastern S.S. Lines v. Monahan*, 110 F.2d 840 (1st Cir. 1940). A claimant who shows he is unable to return to his former employment establishes a prima facie case of total disability. The burden then shifts to the employer to show the existence of suitable alternative employment. *P&M Crane v. Hayes*, 930 F.2d 424, 430 (5th Cir. 1991); *N.O. (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038, 14 BRBS 1566 (5th Cir. 1981). Furthermore, a claimant who establishes an inability to return to his usual employment is entitled to an award of total disability compensation until the date on which the employer demonstrates the availability of suitable alternative employment. *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128 (1991). If the employer demonstrates the availability of realistic job opportunities, the employee's disability is partial, not total. *Southern v. Farmer's Export Co.*, 17 BRBS 64 (1985). Issues relating to nature and extent do not benefit from the Section 20 (a) presumption. The burden is upon Claimant to demonstrate continuing disability (whether temporary or permanent) as a result of his accident.

If an injury occurs to a body part specified in the statutory schedule, then the injured employee is limited to the permanent partial disability schedule of payment contained in Section 908 (c)(1) through (20). The rule that the scheduled benefits are exclusive in cases where the scheduled injury, limited in effect to the injured part of the body, results in a permanent partial disability was thoroughly discussed by the Supreme Court in *Potomac Electric Power Company v. Director, OWCP*, 449 U.S. 268, 101 S. Ct. 509, 66 L. Ed. 446 (1980) (hereinafter "*PEPCO*"). However, a scheduled injury can give rise to permanent total disability pursuant to Section 908 (a) in an instance where the facts show that the injury prevents a claimant from engaging in the only employment for which he is qualified. *PEPCO*, 101 S. Ct. at 514 n. 17. Therefore, if Claimant establishes that he is totally disabled, the schedule becomes irrelevant. *Dugger v. Jacksonville Shipyards*, 8 BRBS 552 (1978), *aff'd*, 587 F.2d 197 (5th Cir. 1979).

A worker entitled to permanent partial disability for an injury arising under the schedule may be entitled to greater compensation under Sections 8(a) and (b) by a showing that he is totally disabled. *PEPCO, supra*.; *Davenport v. Daytona Marine and Boat Works,* 16 BRBS 196, 199 (1984). Unless the worker is totally disabled, however, he is limited to the compensation provided by the appropriate schedule provision. *Winston v. Ingalls Shipbuilding,* 16 BRBS 168, 172 (1984). Scheduled awards generally commence on the date of the claimant's maximum medical improvement. Claimant's permanent disability here is limited to his schedule award.

Dr. Crotwell assigned Claimant's left hand a permanent impairment rating of 6% (EX 6, p. 5-7). There is no indication from any doctors that Claimant is unemployable, and, although his injuries and surgeries limit his lifting abilities, those findings do not provide persuasive evidence that Claimant cannot perform the only job for which he is qualified. Dr. Fleet,

Claimant's preferred physician, stated that Claimant was capable of performing a sedentary job (CX 3, p.31), and Dr. Crotwell released Claimant to light duty work.

Although Claimant argues he searched for a job, I find that his efforts were far from diligent. Claimant testified to his efforts at searching for a job following his release from Dr. Crotwell's care up until Dr. Fleet restricted him from any work at all. Although Claimant stated he called some prospective employers, he was very frank about his restrictions, and therefore, many employers were hesitant to hire him. Although Claimant said he inquired as to the requirements of many jobs, he failed to actually apply for most jobs, or make an effort to be hired by employers. In spite of his physical lifting restrictions, and his inexperience with computers, Claimant was by no means capable of only performing his former employment.

Therefore, since Claimant had been assigned a permanent impairment, and restricted to light duty, he could be expected to engage in some type of employment. Following the proffered labor market survey presented at the time of the formal hearing, Claimant made some inquiries, however, he was not immediately hired. However, I am convinced from Dr. Crotwell's records, and Dr. Fleet's deposition testimony that Claimant was capable of employment much earlier, and I accept the retroactive labor market survey (September 24, 1999), that employment was available to Claimant when he reached MMI. Consequently, since Claimant has failed to prove that he incapable of performing the only work for which he is qualified, under the mandates of *PEPCO* he is limited to compensation for a scheduled injury.

In this instance, I find, through Dr. Crotwell's testimony, that it has been shown that Claimant has an 6 % permanent impairment of the left hand, with which Dr. Blevens agrees. Section 908(c)(3) of the Act specifies under the schedule a maximum of 244 weeks for the 100% impairment of a hand. Therefore, Claimant's permanent partial award will be 14.64 weeks, based upon the 6% impairment rating.[8]

Medicals

In order for a medical expense to be assessed against the employer, the expense must be both reasonable and necessary. *Parnell v. Capitol Hill Masonry,* 11 BRBS 532, 539 (1979). Medical care must be appropriate for the injury. 20 C.F.R. § 702.402. A claimant has established a prima facie case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work related condition. *Turner v. Chesapeake & Potomac Tel. Co.,* 16 BRBS 255, 257-258 (1984). The claimant must establish that the medical expenses are related to the compensable injury. *Pardee v. Army & Air Force Exch. Serv.,* 13 BRBS 1130 (1981). *Suppa v. Lehigh Valley R.R. Co.,* 13 BRBS 374 (1981). The employer is liable for all medical expenses which are the natural and unavoidable result of the work injury, and not due to an intervening cause. *Atlantic Marine v. Bruce*, 661 F.2d 898, 14 BRBS 63 (5th Cir. 1981), *aff'd* 12 BRBS 65 (1980).

[8]Claimant's impairment rating (6%) times the number of scheduled weeks he is entitled to under § 8(c)(3) (244 weeks) equals 14.64 weeks of compensation. Claimant was paid permanent partial disability of 6% to his left hand beginning September 24, 1999 for a period of 14.64 weeks at a rate of $377.61, based on an average weekly wage of $566.40 for a total of $5,528.21 (EX 4, p. 2).

An employee cannot receive reimbursement for medical expenses under this subsection unless he has first requested authorization, prior to obtaining the treatment, except in cases of emergency or refusal/neglect. 20 C.F.R. § 702.421; *Shahady v. Atlas Tile & Marble Co.*, 682 F.2d 968 (D.C. Cir. 1982) (per curium) *rev'g* 13 BRBS 1007 (1981), *cert. denied*, 459 U.S. 1146 (1983); *McQuillen v. Horne Bros., Inc.*, 16 BRBS 10 (1983); *Jackson v. Ingalls Shipbuilding Div., Litton Sys.*, 15 BRBS 299 (1983); *Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112 (1996). The employer is ordinarily not responsible for the payment of medical benefits if a claimant fails to obtain the required authorization. *Slattery Assocs. v. Lloyd*, 725 F.2d 780, 787, 16 BRBS 44, 53 (CRT)(D.C. Cir. 1984); *Swain v. Bath Iron Works Corp.*, 14 BRBS 657, 664 (1982). Failure to obtain authorization for a change can be excused where the claimant has been effectively refused further medical treatment. *Lloyd*, 725 F.2d at 787, 16 BRBS at 53 (CRT); *Swain*, 14 BRBS at 664; *Washington v. Cooper Stevedoring Co.*, 3 BRBS 474 (1976), *aff'd*, 556 F.2d 268, 6 BRBS 324 (5th Cir. 1977); *Buckhaults v. Shippers Stevedore Co.*, 2 BRBS 277 (1975). An employee cannot receive reimbursement for medical expenses under this subsection unless he has first requested authorization, prior to obtaining the treatment, except in cases of emergency or refusal/neglect. 20 C.F.R. § 702.421; *Shahady v. Atlas Tile & Marble Co.*, 682 F.2d 968 (D.C. Cir. 1982) (per curium) *rev'g* 13 BRBS 1007 (1981), *cert. denied*, 459 U.S. 1146 (1983); *Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112 (1996).

Once the employer has refused to provide treatment or to satisfy a claimant's request for treatment, the claimant is released from the obligation of continuing to seek employer's approval. *Pirozzi v. Todd Shipyards Corp.*, 21 BRBS 294 (1988); *Betz v. Arthur Snowden Co.*, 14 BRBS 805, 809 (1981). The claimant then need only establish that the treatment subsequently procured on his own initiative was necessary for treatment of the injury, in order to be entitled to such treatment at the employer's expense. *Rieche v. Tracor Marine*, 16 BRBS 272, 275 (1984); *Beynum v. Washington Metro. Area Transit Auth.*, 14 BRBS 956, 958 (1982).

The medical expenses Claimant is seeking include all of Claimant's treatment by Dr. Fleet. Claimant provided evidence that Dr. Fleet, a neurologist, was referred by Dr. Crotwell, Claimant's choice of physician (CX 2, p.8). Claimant first saw Dr. Fleet on November 29, 1999. Although there is some indication that Dr. Fleet was not initially recommended as a result of work related injuries, some of his treatment did in fact focus on the CTS which arose from Claimant's work related injuries. Furthermore, Dr. Fleet eventually became Claimant's primary physician after Dr. Crotwell ceded the maintaining and providing of all medication to Dr. Fleet on July 9, 2001.

In January 2000, Dr. Crotwell noted that Claimant should see the neurologist if changing medication did not help. However, the referral was specifically made with the statement that the neurological consult was not related to Claimant's work injury (CX 2, p. 61), in spite of the fact that the medication that he sought to change was related to Claimant's CTS. Claimant returned to Dr. Crotwell on July 9, 2001, at which time Dr. Crotwell suggested that Dr. Fleet should follow Claimant and treat him for his problems (CX 2, p. 62). In sum, I find that since Dr. Crotwell had recommended a neurologist, Dr. Fleet did treat Claimant's work-related condition, and Dr. Crotwell ultimately released Claimant into Dr. Fleet's care, therefore, the medical

expenses which relate to Claimant's left extremity(hand) were both reasonable and necessary and therefore, are covered by the Act.[9]

Average Weekly Wage

Section 10 sets forth three alternative methods for determining a claimant's average annual earnings, which are then divided by fifty-two, pursuant to Section 10(d), to arrive at an average weekly wage. 33 U.S.C. § 910(d)(1). The computation methods are directed towards establishing a claimant's earning power at the time of the injury. *Johnson v. Newport News Shipbuilding & Dry Dock Co.*, 25 BRBS 340 (1992); *Lobus v. I.T.O. Corp.*, 24 BRBS 137 (1990).

Sections 10(a) and 10(b) apply to an employee working full-time in the employment in which he was injured. *Roundtree v. Newpark Shipbuilding & Repair, Inc.*, 13 BRBS 862 (1981), *rev'd* 698 F.2d 743, 15 BRBS 94 (CRT) (5th Cir. 1983), *panel decision rev'd en banc*, 723 F.2d 399, 16 BRBS 34 (CRT) (5th Cir.) *cert. denied*, 469 U.S. 818 (1984). Section 10(a) applies if the employee worked "substantially the whole of the year" preceding the injury, which refers to the nature of the employment not necessarily the duration. The inquiry should focus on whether the employment was intermittent or permanent. *Gilliam v. Addison Crane Co.*, 21 BRBS 91 (1987); *Eleazer v. General Dynamics Corp.*, 7 BRBS 75 (1977). If the time in which the claimant was employed was permanent and steady then Section 10 (a) should apply. *Duncan v. Washington Metropolitan Area Transit*, 24 BRBS 133 (1990) (holding that 34.5 week of work was "substantially the whole year", where the work was characterized as "full time", "steady" and "regular") . The number of weeks worked should be considered in tandem with the nature of the work when deciding whether the Claimant worked substantially the whole year. *Lozupone v. Lozupone & Sons*, 12 BRBS 148, 153-156 (1979).

The parties agree, and I concur, that section 10(a) applies to this Claimant who worked almost a full 52 weeks with Employer preceding his injury. The amount of his average *daily* wage is an integral part of the calculations under 10(a).[10]

Employer argues that Claimant's average *daily* wage should be determined by dividing the total number of hours Claimant worked in a year by the number of weeks to arrive at an average hourly wage which would then be multiplied by 8 for an average daily wage. From that

[9] Employer's attorney did not offer argument on this issue. According to Claimant's post-hearing brief, after the Informal Conference, Employer accepted its' responsibility and conceded it was obligated to provide payment for Dr. Fleet's care.

[10] " If the injured employee shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary for a six-day worker and two hundred and sixty times the average daily wage or salary for a five-day worker, which he shall have earned in such employment during the days when so employed." **33 U.S.C. 910(a)**

point the calculations are mandated by 10(a) for a five day worker.[11] Employer argues that their method is fairer, because it takes into account that on some days Claimant would have worked more than 8 hours and on some days less, and therefore, using an average of 8 hours provides a more "fair and equitable" result.

Claimant, on the other hand, arrives at the average daily wage by dividing the total earnings by the number of days worked.[12] With that figure determined, Claimant calculates the rest of the formula as required by 10(a) for a five day worker.[13]

In *Baldwin v. General Dynamics Corp.*, 5 BRBS 579 (1977), the trier of fact had calculated Claimant's average daily wage in a similar manner to the one suggested by Employer, multiplying the claimant's hourly wage by eight hours. The Benefits Review Board overturned that method of calculation stating that "an incorrect method of determining the average daily wage" was employed, and instead instructing that complying with the language of 10(a) meant "dividing the total wages of the employee for the fifty-two weeks preceding the injury by the number of days he worked during that period." *Id* at 583.

In *Tangorra v. National Steel & Shipbuilding Co.*, 6 BRBS 472 (1977), the Board stated that "a proper determination of the average weekly wage pursuant to Section 10(a) first requires that the average daily wage be computed by dividing the total wages paid during the fifty-two week period immediately preceding the injury by the number of days worked in that period."

In *Cippolone v. General Dyamics Corp.*, 7 BRBS 94 (1977), the employer asserted that the proper method of computing the average daily wage would be to multiply claimant's hourly rate by eight hours, providing a "fair and reasonable" approximation of a claimant's wage earning capacity. The Board rejected that argument, citing *Baldwin*, *supra.*, and reiterated that the proper method is to divide the total wages by the number of days worked in the 52 weeks preceding the injury. *Cippolone* at 97.

Following the jurisprudence, as well as the plain language of the Act, Employer's method of calculation has no merit. Therefore, Claimant's average weekly wage is $22,406.29(total wages) ÷ 194(number of days worked including those days in which Claimant only worked minimal hours) = $115.50 x 260 days (because Claimant is a five day worker) = $30,030.00 (average annual wage) ÷ 52(number of weeks according to 10(d)) = $577.50.

[11] Average daily wage $113.28 (average hourly rate $14.16 x 8 hours per day) x 260 (as a 5 day worker), divided by 52 weeks= $566.40

[12] However, curiously, Claimant added some of the days together, especially those in which Claimant worked only minimal hours, to arrive at 181 days worked. For example if Claimant worked 2 hours on a Tuesday, and 3 hours on a Wednesday, and then 2 more hours on a Thursday, Claimant added up the hours worked and counted those 3 days as 1 day.

[13] Average daily wage $123.79 x 260 (as a 5 day worker), divided by 52 weeks= $618.95

ORDER

It is hereby **ORDERED, ADJUDGED AND DECREED** that:

(1) Employer shall pay to Claimant compensation for temporary total disability benefits from May 11, 1999 through July 6, 1999, based on an average weekly wage of $577.50;

(2) Employer shall pay to Claimant scheduled compensation for permanent partial disability benefits of 6% to his left hand from September 24, 1999, the date of maximum medical improvement, for 14.64 weeks, based on an average weekly wage of $577.50;

(3) Employer shall pay or reimburse Claimant for all reasonable and necessary medical expenses, resulting from Claimant's injuries of November 18, 1998, including treatment for his work-related injury which was provided by Dr. William Shepard Fleet;

(4) Employer shall be entitled to a credit for all payments of compensation previously made to Claimant;

(5) Employer/Carrier shall pay interest on all of the above sums determined to be in arrears as of the date of service of this ORDER at the rate provided by in 28 U.S.C. §1961 and *Grant v. Portland Stevedoring Co.,* 16 BRBS 267 (1984);

(6) Claimant's counsel shall have twenty days from receipt of this Order in which to file a fully supported attorney fee petition and simultaneously to serve a copy on opposing counsel. Thereafter, Employer shall have ten (10) days from receipt of the fee petition in which to file a response; and

(7) All computations of benefits and other calculations which may be provided for in this ORDER are subject to verification and adjustment by the District Director.

Entered this 28th day of August, 2003, at Metairie, Louisiana.

A

C. RICHARD AVERY
Administrative Law Judge